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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

In re B.C., a Person Coming Under the
Juvenile Court Law.

HUMBOLDT COUNTY DEPARTMENT
OF HEALTH AND HUMAN
SERVICES,

Plaintiff and Respondent,

v.

B.K., ET AL.,

Defendants and Appellants.

A154714

(Humboldt County
Super. Ct. No. JV170127)

J.C. (Father) and B.K. (Mother) appeal from an order denying their petitions under Welfare and Institutions Code section 388 and terminating their parental rights as to their daughter B.C. (Minor).¹ Father contends (1) the court, county counsel, and respondent Humboldt County Department of Health and Human Services (Department) violated their duties to conduct these proceedings in an expeditious, effective, and nonadversarial manner (§ 350, subd. (a)); (2) the court erred in denying Father's section 388 petition; and (3) the order terminating Father's parental rights must be reversed if we reverse the denial of his section 388 petition. Mother does not claim error in the denial of her section 388 petition or the termination of her parental rights, but she joins in Father's opening

¹ All statutory references are to the Welfare and Institutions Code.

brief on the ground that, if we reverse the termination of Father's parental rights, we must reverse the termination of Mother's parental rights also (Cal. Rules of Court, rule 5.725(a)(1)). We will affirm.

I. FACTS AND PROCEDURAL HISTORY

A. Detention, Jurisdiction and Disposition

Because we have already issued several opinions in appeals and writ proceedings arising out of this dependency case, we begin with only a cursory discussion of the events preceding the matters on review.

The Minor was born on June 30, 2017 and detained that same day. At a jurisdictional hearing in October 2017, the court sustained amended allegations under subdivisions (b) and (j) of section 300, based on Father's and Mother's substance abuse issues, previous neglect of V.C. – the Minor's sibling (Sibling) – and failure to comply with the case plan as to Sibling.² As to subdivision (b), the court found that the Minor was at substantial risk of suffering serious emotional or physical harm due to Father's ongoing substance abuse and Mother's history of substance abuse and failure to complete court-ordered programs addressing those problems. As to subdivision (j), the court found that the Minor was at substantial risk of being abused or neglected because of Mother's and Father's abuse or neglect of Sibling and unresolved substance abuse.

In its disposition order of March 1, 2018, the juvenile court removed the Minor from the parents' care, bypassed the parents for reunification services, and set a section 366.26 hearing for June 25, 2018. Among other things, without disputing that the parents participated in programs and were substantially free from drugs at the time, the court based its decision on the parents' lack of credibility as to their substance abuse issues and participation in services.

² The dependency petition as to Sibling ultimately resulted in the termination of Father's and Mother's parental rights and a permanent plan of adoption, which we affirmed in our unpublished opinion in *Humboldt County Department of Health and Human Services v. J.C.* (Oct. 29, 2018, A153899) [nonpub. opn.].

The parents filed writ petitions challenging the March 2018 disposition order (A153831). We denied those petitions in June 2018, finding substantial evidence that returning the Minor to the parents would place her in substantial danger, and the court did not err in bypassing reunification services because substantial evidence supported the conclusion that the parents had not made reasonable efforts to address the issues that had led to Sibling's removal. The parents also filed appeals from the disposition order, which are pending (A153816).

B. Department's Section 366.26 Report and Addendum Report

The Department submitted a report for the section 366.26 hearing, advising that the Minor, still in the care of her foster family, was healthy and developmentally on track. The court had set adoption as the Minor's permanent plan, her foster family was in the process of becoming approved to adopt Sibling and wanted to adopt the Minor as well, and the Minor and Sibling shared a close bond. Father and Mother had supervised visitation twice a week for two hours.

The Department's Adoption Assessment Addendum advised that the Minor had been living with her foster family since she was two weeks old. Her foster parents consistently met her needs, demonstrated commitment to providing the Minor and Sibling a permanent home, had been approved as adoptive parents for Sibling, and were on track to be approved as adoptive parents for the Minor.

C. Father's Section 388 Petition

On June 6, 2018, Father filed a section 388 petition, requesting that the court vacate the section 366.26 hearing and either "order family maintenance or family reunification services" (implying a return of the Minor to his care) or order reunification services. Father alleged he had reached a milestone of remaining sober for "at least 1 year," was voluntarily testing clean, and was participating in substance abuse aftercare treatment. Father also alleged he visited the Minor, was bonded to her, and had steady employment and housing. He alleged that the "[r]isk of harm has been eliminated" and the Minor "deserves to be raised by her biological parents if risk or detriment no longer exists." Father attached to the petition his visitation records, along with a progress report

from his aftercare program stating that he continued to test, used the program as a support, and “from what we observe, he maintains a quality recovery program.”

The court set Father’s petition for hearing on the same date as the section 366.26 hearing.

On June 25, 2018, the Department filed its opposition to Father’s section 388 petition. It noted that Father had not obtained a sponsor or started on the “steps at NA or AA,” had not taken *random* drug tests, and was observed by a social worker to act in a manner she believed consistent with someone under the influence. Although commending the parents for their (recent) efforts, the Department opined that they had not demonstrated substantial behavioral changes and it was not in the Minor’s best interest to be placed with them.

According to Father, the Department’s opposition contained the following assertions that, in his view, were misrepresentations. First, the Department stated that the Indian Child Welfare Act (25 U.S.C. §§ 1901 et seq.; ICWA) did not apply, while the court had previously found only preliminarily that ICWA was inapplicable, and the Department had thereafter failed to provide notice to any tribes. Second, the Department did not disclose that Father’s first section 388 petition (as to Sibling) was denied without a hearing and that limited evidence was taken in denying his second section 388 petition as to Sibling. Third, he argues, the Department misstated this court’s opinion in denying his petition for relief from the order setting the section 366.26 hearing as to the Minor (A153831), “completely ignoring that the decision was on the disposition orders only, leaving open the issue of jurisdiction, and was dismissed as to father on procedural grounds.”³ Fourth, Father contends the Department misstated that he had not taken any

³ Actually, it is Father who miscasts our opinion. We did not dismiss Father’s petition on procedural grounds. We denied his petition after explaining his failure to comply with the Rules of Court *and* noted, “As will be seen in our discussion of the issues raised in Mother’s petition, *post*, Father’s arguments in support of his petition are meritless anyway.” In its opposition report, the Department quoted portions of our opinion that concluded substantial evidence supported the court’s findings as to *both* parents, and attached a copy of our opinion.

random drug tests and was always tested on Mondays. Fifth, the Department repeated its allegation that Father appeared to be under the influence at a visit notwithstanding a negative hair follicle test and testimony by a visitation supervisor that she had not noted any such incidents or indications in the visitation logs. Sixth, the Department reported that Father failed to participate in domestic violence counseling even though it was not in his case plan or offered to him. Seventh, the Department repeated its position that there had been no demonstration of any behavioral change during Sibling's case plan.

D. Hearing on Father's Section 388 Petition and Section 366.26 Hearing

On June 25, 2018, the hearing on Father's section 388 petition and the section 366.26 hearing were conducted by visiting Judge Doris Shockley, who had also presided over the disposition hearing.

Father moved into evidence the attachments to his section 388 petition, but he did not testify or present witnesses or further documents. The court admitted the Department's opposition to Father's petition. Father's attorney argued that Father had been sober during the Minor's entire life, having entered residential treatment before she was born. He noted the positive visits and indications of bonding between the parents and the Minor. He argued: Father's situation has changed. It's not just changing; it has changed. He is clean and sober and consistently maintaining that." He further asserted that, when the court had bypassed reunification services it might have thought sobriety would not "stick," but it had. On the other hand, the Minor's counsel argued that Father's proposed modification was not shown to be in the best interests of the Minor, and the evidence presented by Father did not show a parent-child bond.

The court observed that, while Father had been inadequate in terms of his aftercare, the court was impressed with his progress. The court nonetheless concluded: "But I am in agreement with counsel for the children, and her distress is the same as mine about the unfortunate situation we're in. But I don't believe there has been any changed circumstance that's substantial. Things are changing and, I think, improving and – but I do not feel that there is any indication that it would be in the best interests of the child to grant this."

By written order filed on June 26, 2018, the court denied Father's section 388 petition, finding that his petition stated a change of circumstance but the Minor's best interest was not promoted by his proposed modification. By separate written order filed that same date, the court found there was clear and convincing evidence that the Minor will likely be adopted, and the placement was necessary and appropriate. The court terminated the parental rights of Father and Mother and set adoption as the Minor's permanent plan.

This appeal followed.

II. DISCUSSION

A. Fair Hearing

Section 350, subdivision (a)(1) provides: "The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his or her welfare with any provisions that the court may make for the disposition and care of the minor."

Father contends the Humboldt Superior Court, county counsel, and the Department violated their duties to conduct these proceedings in an expeditious, effective and nonadversarial manner. He argues that this case falls so far short of the goals of protecting children and preserving families that it deprived him of a fair hearing. In particular, he argues, in the Sibling's and Minor's cases there was "an ever-changing roster of judges, repeated misrepresentations in the reports even after adjudication of facts had occurred, and an on-going attitude and conduct by County Counsel that it was more about winning than fairness to the participants." He adds that "[t]he only party and attorney who appears to have attempted to comply with the rules was father and his

counsel.” “Moreover,” he concludes, “this system resulted in multiple continuances and the need for lengthy briefing.”

Father’s argument is meritless. He received a full evidentiary hearing on his section 388 petition, with full opportunity to testify (which he did not do) and present evidence, while represented by counsel who had ample opportunity to argue Father’s position. He does not provide any record citation to any objection he or his attorney made at the hearing on the ground the proceedings were unfair. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501–502 [procedural defects may be waived by failing to object in trial court].) The hearing was not an “informal nonadversary” one because, in fact, there were “contested issue[s] of fact [and law].” (§ 350, subd. (a)(1).) Father makes no showing that the service of multiple jurists during the proceedings rendered the section 388 hearing unfair. And while he complains of the Department’s “misrepresentations,” he had ample opportunity to address the Department’s statements during the hearing.⁴

B. Section 388 Petition

Under section 388, a parent may petition “for a hearing to change, modify, or set aside any order of court previously made” on the grounds of a “change of circumstance or new evidence.” To prevail on the petition, the parent must establish that the changed circumstances or new evidence are such that the proposed change in the court’s order would promote the child’s best interests. (§ 388, subds. (a), (b); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309–310.)

1. Change in Circumstances

At the disposition hearing, the court found that placing the Minor in Father’s care would create a substantial risk of detriment to her safety, and that reunification services should be bypassed under section 361.5, subdivision (b)(10) due to Father’s failure to treat the problems that led to the sibling’s removal. The court based its decision on,

⁴ Similarly, in proceeding A153899, we affirmed the court’s order terminating Father’s parental rights and denying his section 388 petitions as to Sibling, rejecting his argument that he was denied due process by the continuance of the hearings on those petitions and by having one judge preside over evidentiary hearings and other judges render certain rulings.

among other things, Father's dishonesty regarding his history of substance abuse and his decision to complete only a 90-day treatment program, despite the recommendation of a six month residential treatment program due to his substance abuse history and prior difficulty complying with outpatient treatment. It was also noted that, although disputed, there was evidence that Father appeared under the influence during a visit with the Minor and Sibling in November 2017, about four months before the disposition order.

In his section 388 petition filed only about three months after the disposition order, Father alleged he had been sober "at least one year" – throughout the Minor's lifetime and the duration of the proceedings – and that he was participating in aftercare and visiting the Minor with whom he had allegedly bonded. Although he provided visitation logs and a progress report from his aftercare program, he did not testify or offer witness testimony to support his allegations. Moreover, he did not provide evidence that his claimed change of circumstance ameliorated the risks with which the court had been concerned. In light of his long history of substance abuse, prior relapse, failure to communicate with the Department, dishonesty with the court regarding his substance abuse history, and election to participate in only a 90-day program, it was reasonable for the court to find that evidence of more recent events had not demonstrated "any changed circumstance that's substantial."

Father argues that the court erred by denying the petition on the ground his circumstances were "changing" but not yet "changed." But that is not what the court said. The court noted that "things are changing" and "improving" but there was not a "changed circumstance *that's substantial*." (Italics added.) By this phrase, the court may have meant that whatever had changed did not constitute a changed circumstance for purposes of section 388. (See *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485 [change of circumstances under § 388 must be significant].) Alternatively (and more likely since the court's written order stated there *was* a changed circumstance), the court may have meant that there was a changed circumstance, but it was insufficient under the statute because, as the court also found, the proposed modification would not further the Minor's best interests. To that determinative issue, we turn next.

2. Best Interest of the Child

By the time Father filed his section 388 petition, reunification services had been bypassed and the focus had shifted to the Minor's needs for permanency and stability. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Accordingly, it was Father's burden to overcome a rebuttable presumption that adoption was in the Minor's best interest. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 464.)

Substantial evidence supported the court's conclusion that Father had failed to rebut the presumption that the Minor's best interests would be served by adoption, rather than a return of custody or reunification services to Father. The Minor had lived with her foster family since she was two weeks old, in the only home she had ever known. She was doing well with her foster family, who had been approved as her adoptive family and had already adopted the Minor's sibling, with whom the Minor shared a close bond. It was reasonable for the court to conclude that Father's claimed sobriety and supervised visits, although laudable, were not enough at such a late date. (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 [prospect of parent restarting reunification services did not promote stability for the child, who was in a loving and stable home and her caregiver was the only parent she had known]; *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 464.)

Father again claims he was sober, there was no evidence his behavior was actually detrimental to the children, a social worker noted that during visits it was mostly Father who spent time playing with the Minor, visits had gone well, the parents were observed to be loving and appropriate with her, and Father had bonded with her. However, he overlooks the fact that any bond that formed was in the course of supervised visits, not day-to-day parenting. Moreover, it is not our role to reweigh the evidence. Substantial evidence supports the juvenile court's factual conclusions, and the court did not err in denying Father's section 388 petition.

C. Termination of Parental Rights

Father argues that, if we reverse the denial of his section 388 petition, we must also reverse the termination of his parental rights. (Citing *In re Sean E.* (1992) 3

Cal.App.4th 1594, 1599; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.) Because we do not reverse the denial of the section 388 petition, Father has not established any basis for reversing the termination of his parental rights.

III. DISPOSITION

The order is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A154714)